

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIA HENRY, et al.,

Plaintiffs,

vs.

BROWN UNIVERSITY, et al.,

Defendants.

) Docket No. 22 C 125

) Chicago, Illinois
) February 23, 2023
) 9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

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1 (The following proceedings were had by video:)

2 THE COURT: This is Judge Kennelly. It's a video
3 hearing.

4 I think defense counsel sent a list of appearances to
5 my courtroom deputy clerk, so we don't need to go through
6 that.

7 I don't know if the same was done on the plaintiffs'
8 side or not, but do plaintiffs' counsel -- does anybody want
9 to put your names on the record at this point?

10 You're muted.

11 MR. GILBERT: Robert D. Gilbert.

12 THE COURT: You're not muted, but you got to crank
13 your volume up. I'm barely hearing you.

14 MR. GILBERT: This is Robert D. Gilbert.

15 Is that better, your Honor?

16 THE COURT: That's way better. Thanks.

17 MR. GILBERT: Okay. Gilbert Litigators & Counselors
18 on behalf of the plaintiffs.

19 THE COURT: All right. So I set this because of the
20 motion that I got from the plaintiffs asking for a hearing on
21 what were represented to be three issues. The three issues
22 are the issue about custodians and the president's office and
23 development office; the second was -- has to do with TAR,
24 which is -- for the benefit of the court reporter, is T-A-R,
25 all capitals; and the third has to do with production dates.

1 So the first of those, I think I can take care of
2 pretty quickly.

3 I'm not sure who that was. But if you're not
4 talking, please mute yourself. Thanks.

5 The first of those, I can take care of pretty
6 quickly. I dealt with it in our hearing on February the 8th.
7 I don't know that anybody's ordered the transcript yet, but
8 I'm looking at the rough transcript. And the rough
9 transcript, it's at page 61. I don't know if that will
10 translate into the same page as when you get to the official
11 version or not, but here's what it says. This was after a
12 discussion about depositions of certain presidents or former
13 presidents who had allegedly made public comments.

14 Here's what I said:

15 As far as adding the development and president's
16 office as custodians, I'm putting the pause on that for now.
17 We're going to readdress that in a couple of months, once
18 stuff is actually getting produced. I have to get this thing
19 off the dime, so we're going to put the pause on having
20 custodians from the development and president's office right
21 now.

22 Here's what that means for the defendants. So I want
23 to make real clear what that means for the defendants. What
24 it means is that if I later determine there is a basis to
25 include those for some or all of the defendants, you're not

1 going to get a whole lot of time to produce the stuff, and
2 you're not going to get to do it at anybody's leisure; it's
3 going to be my definition of when you get it done.

4 So as far as I'm concerned, that issue's off the
5 table. For now, we're presumably going to revisit it at some
6 point in time, but I don't really see a basis for -- at this
7 point, for further discussion about that, so what I intend to
8 do is move on to the other two.

9 And the defendants are telling me they're not ripe.
10 And I get what you're saying, that you're still talking about
11 this, but I need to say this:

12 We've got to -- there's a deadline that's in place;
13 it's less than two weeks from now. In fact, it's only barely
14 more than a week from now regarding substantial completion of
15 production, and to some extent, we're still talking about the
16 shape of the table here, and that's not a good thing, and so
17 we are going to talk about these things today. And if that
18 means that -- you know, that you're not going to have, you
19 know, three more four-hour meet and confers with the other
20 side, then, okay, we're just putting the fast-forward button
21 on.

22 So let's talk, first, about the TAR issue. Who wants
23 to talk -- I've got the plaintiffs' position and the thing
24 that was filed on the -- back on -- well, I guess, the more
25 recent thing that was filed just the other day.

1 So can the defendants kind of talk to me about that,
2 whoever is going to deal with it?

3 MS. MAURER: Yes, your Honor, this is Jessica Maurer,
4 on behalf of Georgetown, for the defendants.

5 Our position is that the appropriate standard to
6 apply in assessing the defendants' TAR process is reasonable
7 and proportional. The weight of the authority, both case law
8 and Sedona Principle 6, supports our position that search
9 terms are an appropriate tool to use to pre-cull the document
10 population before implementing a TAR workflow. I'm happy to
11 provide you with some case citations, if that would be
12 helpful.

13 Plaintiffs' approach would significantly increase the
14 burden on TAR defendants by requiring us to add potentially
15 millions of documents into our review queue that are likely
16 not relevant because they're not hitting on an extensive list
17 of search terms that the parties have negotiated specifically
18 to identify responsive documents.

19 THE COURT: Can you just -- I get that that's -- can
20 you explain to me how you get there? So why is it that the
21 plaintiffs' approach is going to -- would end up adding all of
22 these extra documents?

23 MS. MAURER: Yes, your Honor. So it's impossible to
24 tell you exactly how many documents we're going to have to
25 review, but our e-discovery experts suggest that it's

1 reasonable to expect to review about 75 percent of the
2 document population in a TAR review. So if we have 4 million
3 documents, 75 percent of that is a lot higher than if we're
4 talking about 750,000 documents.

5 THE COURT: Okay. I guess my question was why is --
6 and maybe this is just a fairly overt display of my ignorance
7 here, but why is it that the plaintiffs' approach is going to
8 make you look at more things?

9 MS. MAURER: It's simply the number of documents that
10 you're adding into the review queue on the whole, on the
11 total. So our approach would be to, first, cull our
12 collection using search terms that the parties have agreed
13 upon. And speaking for Georgetown, that population would be
14 about 640,000 documents. From there, we would implement our
15 TAR workflow, and our e-discovery vendors would expect that we
16 would look at about 75 percent of those documents.

17 Using the plaintiffs' approach --

18 THE COURT: What you're talking about right -- what
19 you're talking about right now seems to me to -- and I'm -- I
20 know -- of all of the people on this call, I know the least
21 about this, okay?

22 So what you're talking about right now seems to me to
23 be what Mr. Gilbert's part of the status report filed on
24 February 10th calls the second area. The second area concerns
25 the use of applying search terms before applying TAR methods.

1 The parties disagree over whether it's appropriate to use
2 search terms, dot, dot, dot, to pre-cull defendants' documents
3 prior to applying TAR methods. That's what I think you were
4 just talking about; is that right?

5 MS. MAURER: Yes, your Honor.

6 THE COURT: The other issue -- I think I get your
7 position on that.

8 The other issue, what he calls the first area, is
9 what's called the target recall rate.

10 MS. MAURER: Yes, your Honor.

11 THE COURT: And so it's a question of setting a
12 percentage, I guess.

13 MS. MAURER: So the recall rate is essentially the
14 number of responsive documents from your entire population
15 that you have actually identified. So defendants suggest that
16 a target recovery of about 70 percent is a reasonable and
17 proportionate rate. This is just a target, right? So the
18 defendants may actually exceed 70 percent recall. In some
19 interim testing that some defendants have done suggest that
20 they will exceed 70 percent by a significant margin.

21 So we're talking right now about a target.
22 70 percent -- it's our position that 70 percent recall has
23 been recognized in prior cases as reasonable. So, for
24 instance, in *Broiler Chicken*, the special master said that 70
25 to 80 percent range was reasonable and noted that a higher or

1 even lower percentage could be reasonable depending on the
2 types of documents that you're finding during your testing at
3 the end.

4 So, you know, it's our position that a target of
5 70 percent is reasonable.

6 THE COURT: And so what we're talking about here when
7 we're talking about the percentage, this is the -- this is
8 when you're basically training the system; is that right?

9 MS. MAURER: This is actually at the end of the
10 reviews.

11 THE COURT: The end of the reviews. Okay.

12 MS. MAURER: Yeah. This is actually at the end of
13 the reviews. So it's a -- how many responsive documents out
14 of the total population of responsive documents did you find,
15 so our position is that 70 out of 100 is reasonable.

16 THE COURT: Okay. I get you. If I can translate
17 that into 1980s terms, if you don't mind.

18 So what that means is that -- is that if there were
19 100 responsive documents out there, 70 percent means the
20 search method is going to get 70 of them.

21 MS. MAURER: Correct, your Honor.

22 THE COURT: And the plaintiffs are going to get 85.

23 MS. MAURER: Well, that's the target.

24 And I would like to add that if we're comparing this
25 to a linear review -- so a review where you're looking at

1 every single document, studies have suggested that, you know,
2 an average recall for that type of review is about 60 percent.
3 And there's no reason to hold TAR to a higher standard than a
4 linear review, where you're looking at every single document.

5 THE COURT: So can I just ask, to make sure I'm
6 translating what you just said right, when you say --

7 MS. MAURER: I apologize.

8 THE COURT: -- when you say "linear review," does
9 that mean somebody paging through a paper file?

10 MS. MAURER: That means somebody looking -- so
11 technology-assisted review essentially allows you to stop
12 looking at documents before you --

13 THE COURT: No, I get what TAR is; I want to know
14 what you mean by linear.

15 MS. MAURER: Okay. A linear review means you're not
16 using TAR; you're looking at every single document. So if we
17 have a million documents, it means you're looking at a million
18 documents.

19 THE COURT: But you're saying that there are studies
20 that say when a person is actually looking at everything,
21 they're catching less than the TAR does?

22 MS. MAURER: Correct, your Honor.

23 THE COURT: Yikes. That's why I --

24 MR. GILBERT: Your Honor, can I speak to that?

25 THE COURT: Sure. Go ahead.

1 MR. GILBERT: We find it ironic that institutions of
2 higher education find 70 percent a success rate because every
3 student who got 70 percent would be a horrible student or
4 would be failing.

5 THE COURT: Well, it depends on what kind of curve
6 they grade on. I don't know.

7 MR. GILBERT: There you go. There you go. This is a
8 pretty steep curve in their favor, okay, 30 percent false
9 negatives. But in addition to that, they want to compound the
10 false negatives in the search terms. So now, there's like a
11 double whammy on the plaintiffs of false negatives.

12 We don't think that's appropriate, your Honor, and
13 it's not necessary. And by the way, we find it really
14 difficult to listen all the time to how many millions of
15 documents they have to look at because that -- we gave them
16 623 names more than five months ago on donation records.
17 Here's the name of the donor, we believe there's a substantial
18 basis they gave more than \$50,000, and that we gave the name
19 of the donor and the name of the student admitted. Okay?

20 They've all, except Cal Tech, refused to look at 623
21 documents, yet they scream "Millions of documents" if they
22 have to try to get it right in looking for documents in this
23 case. We don't think that's an appropriate line of argument,
24 and we think 85 percent is -- having 15 percent false
25 negatives is a sufficient number of false negatives, and we

1 certainly don't think that we should compound the false
2 negatives by adding search terms on top of TAR. It should be
3 85 percent TAR, or it should be the search terms, but not both
4 making each worse than the other.

5 THE COURT: So if you -- I have a question about the
6 first part, but I'm going to do that second.

7 When you say the search terms on top of TAR, what
8 you're basically telling me I think, and I just want to make
9 sure I'm understanding it right, is that 70 percent ends up
10 actually being less than 70 percent because of -- you're
11 basically compounding things that are going to have false
12 negatives.

13 MR. GILBERT: That's exactly right. There's one set
14 of false negatives, and then there's a second level of false
15 negatives, okay? And so one makes the other worse than the
16 one before.

17 THE COURT: Can I go back to the other thing you
18 mentioned, the thing about the 60 -- however many it was -- or
19 600 names or whatever it was?

20 MR. GILBERT: Yes.

21 THE COURT: And, again, I apologize for asking
22 questions that make it appear that I do not understand what
23 you're talking about because I understand, I think, about
24 70 percent or maybe it's 85 percent.

25 MR. GILBERT: I think I'd assume more than

1 85 percent, your Honor.

2 THE COURT: By the way, that's a TAR joke.

3 MR. GILBERT: Okay. I get it. I get it.

4 THE COURT: It's Volume 1 of 1 of all TAR jokes.

5 MR. GILBERT: Okay. Got it.

6 THE COURT: So is that a -- looking at the 620 names,
7 or whatever it was, is that a separate issue from the TAR or
8 is that part of the TAR stuff?

9 MR. GILBERT: I think it's part of the way they're
10 being serious about searching or not searching. I mean --

11 THE COURT: So let me tell you where I'm going with
12 this because, I mean, I get what you're saying when you say,
13 "Okay. We asked University A to look at -- to look up records
14 regarding 50 people, and we shouldn't" -- and if the records
15 relating to those 50 people is part of the whole ESI and TAR
16 review, then I guess I might say, "Well, why do we have to
17 apply the same TAR percentages to everything?" But if that's
18 a separate thing, then that's a -- my point is kind of
19 worthless.

20 MR. GILBERT: Well, I think it's -- they're certainly
21 related points, okay? I mean, they're not going to look at --
22 I think it goes to the pattern of trying to obfuscate with
23 claims that there's going to be millions of documents
24 involved, okay, and that they should be allowed to make
25 30 percent mistakes that are compounded by other mistakes.

1 They have something that's been sitting in front of them for
2 five months, and they've failed to look at it, except for Cal
3 Tech.

4 MS. MAURER: Your Honor, may I respond to that?

5 So a couple points:

6 First of all, there are separate categories of
7 documents that, speaking for Georgetown, we have agreed to go
8 get, meaning they're separate from our TAR review. We're
9 targeting, you know, targeted searches of documents that
10 plaintiffs have requested that are not part of our TAR review.
11 I cannot respond directly to the 635 documents. I'm not
12 entirely sure what that relates to, but there are separate
13 categories of documents that are separate from our TAR review.

14 Second of all, when we're talking about the numbers
15 of documents, these are -- you know, these are in response to
16 the hundred RFPs that plaintiffs have propounded, and these
17 are actual numbers based on the collections that we've done to
18 date. So for Georgetown, it's 4.7 million documents that
19 would go --

20 THE COURT: Honestly, I wasn't doubting you on that.

21 MS. MAURER: Okay.

22 THE COURT: I mean, I know it's a big case. I know
23 there's a lot of records. So, I mean, whether it's a million
24 two versus a million three, okay, but I wasn't doubting you on
25 that, so you don't need to worry about that.

1 Okay. So let me just kind of for -- play out the
2 string here a little bit. So let's say that today I give you
3 a -- I answer both of these questions, so I give you the
4 percentage on the target recall rate, and I say yes or no
5 whether the search terms are applied before you do the TAR.

6 And I know you can only speak for yourself, but
7 that's a reasonably random sample, I guess. So how soon is
8 stuff going to start actually getting produced? And I
9 recognize that you then -- that somebody's going to have to
10 review stuff, but can you kind of give me the time frame?

11 MS. MAURER: So for Georgetown, we've already started
12 rolling productions. We've made three rolling productions to
13 date. We have another production of about 14,000 documents
14 planned for tomorrow. We have another production obviously
15 planned for March 3rd.

16 THE COURT: That can't be the stuff that we're
17 talking about now as it relates to TAR, right?

18 MS. MAURER: No, that's the stuff that's already in
19 our review.

20 THE COURT: I'm talking about the stuff that we're
21 dealing with in this target recall rate-type thing.

22 MS. MAURER: So in terms of --

23 THE COURT: If I decide both of those issues today
24 and you're good to go, how long is it going to take to get
25 that stuff produced?

1 MS. MAURER: It's going to add a significant amount
2 of time to our review, to be quite frank. We have to add
3 3 million documents into our review.

4 THE COURT: Does that mean a week? a month? a year?

5 MS. MAURER: For Georgetown, I would expect in order
6 to finish the first-level review if we need to add multiple
7 millions of documents it would take us approximately three
8 months. Now we could make rolling productions, your Honor --

9 THE COURT: Yeah, of course.

10 MS. MAURER: -- but I think it would take months.

11 THE COURT: Okay. Anything else anybody wants to say
12 about this that you haven't already said?

13 Okay. I'll take that as a no. I'm going to pause
14 that for a second, and we're going to talk about the other
15 thing.

16 The other thing has to do with -- I'm looking at
17 February 10th, Joint Status Report, page 3, Item Number 2 at
18 the top of page 3, whether defendants should produce
19 structured data concerning defendants' admission decisions
20 through the end of this calendar year; in other words, through
21 the end of 2023. Plaintiffs have asked defendants to do so.

22 So I gather that the defendants haven't agreed to
23 that or at least all the defendants haven't agreed to that.

24 So who's going to talk about that?

25 Somebody else just appeared. You're muted.

1 MR. RYBNICEK: Good morning, your Honor. Jan
2 Rybnicek, counsel for MIT, speaking on behalf of defendants.

3 THE COURT: Okay.

4 MR. RYBNICEK: This issue relates to discovery of
5 materials created after January 9th, 2022, the filing of the
6 complaint. We have -- defendants have agreed to produce
7 several types of materials created during that time. One
8 issue that remains in dispute is the production of financial
9 aid data. We are proposing to provide updated financial aid
10 data in October 2023 that will give completed financial aid
11 data through the most recent calendar year or the most recent
12 school year.

13 Plaintiffs are asking for us to produce data and
14 collect data in December, at the end of December 2023, which
15 is in the middle of the admissions cycle. It would be
16 incomplete, subject to change, and it would obviously create a
17 significant burden on the --

18 THE COURT: Pause for a second.

19 So the dispute, it sounds like, has to do with
20 whether -- putting aside this collection date thing, whether
21 the data concerns -- goes up through the 2022/2023 school year
22 or whether it effectively goes into the following school year.

23 Am I getting you right?

24 MR. RYBNICEK: That's correct, your Honor.

25 THE COURT: Okay. All right. So finish your point.

1 I cut you off in the middle. I just wanted to make sure I was
2 getting it.

3 MR. RYBNICEK: The only thing I was going to add was
4 that this obviously creates a burden because the staff that
5 would be required to pull that data would be in the middle of
6 the busiest time of the year, making the financial aid
7 determinations for the next admissions cycle.

8 THE COURT: Okay. Mr. Gilbert, go ahead on that one.

9 MR. GILBERT: Your Honor, this is a very narrow
10 issue. We have -- our experts have advised us that it's
11 important to have at least two sets of data following the
12 ostensible dissolution of the conspiracy on November 4th --

13 THE COURT: So they need the after to compare it to
14 the before.

15 MR. GILBERT: Exactly. And so in order to --

16 THE COURT: They're telling you they don't want just
17 one year; they want two years.

18 MR. GILBERT: They don't want just one cycle; they
19 want at least the beginning of the next cycle as to what
20 happened, right, because it would go to a lot of proofs if
21 they -- and we haven't requested that the data be produced to
22 us by December 31st; we requested that it be by February 15th
23 of 2024.

24 The burden is really on our experts who then have to
25 produce their final expert report by March 15th, within one

1 month, so the burden is on them. It's not on the people who
2 get two months to provide the data.

3 And the argument -- the only argument that we've
4 heard is that, "Well, they're busy." Well, we've given them
5 until February 15th. Our experts are busy too.

6 THE COURT: Can I ask a question in terms of the data
7 because your status report refers to this as structured data?
8 What exactly does that mean?

9 MR. GILBERT: Structured data and I'm not a stat
10 person myself --

11 THE COURT: Is it --

12 MR. GILBERT: -- but it's quantitative data, okay?
13 And it goes to both the admissions and to the financial aid,
14 okay? It's the quantitative data. What was the size of the
15 awards? How many awards were given? How many students were
16 admitted from a social-economic group? That kind of data,
17 that's the structured data.

18 THE COURT: Okay. If I can ask Mr. -- I'm going to
19 botch your name -- Rybnicek --

20 MR. RYBNICEK: Perfect.

21 THE COURT: Okay.

22 -- this question: So when somebody is pulling this
23 structured data, I assume that what has to happen, and
24 probably you've done this for past years already, is that
25 somebody has to create some sort of a -- it's not a computer

1 program, that's the wrong word, they're going to have to
2 create some sort of a script, in other words, to extract the
3 relevant data from all of the stuff that you've got and spit
4 it out in the form that's being asked for. Is that pretty
5 much right?

6 MR. RYBNICEK: That's pretty much right, and there
7 are multiple tables that need to be collected, and then they
8 need to be anonymized to abide by --

9 THE COURT: Oh, of course. Right, right.

10 So one of the things that Mr. Gilbert said is they
11 aren't actually asking for this in December; they're asking
12 for it in February of next year.

13 MR. RYBNICEK: I understood that they are asking for
14 us to pull it no earlier than December 31st and produce it
15 within 45 days.

16 THE COURT: Okay. What's the date -- what's the date
17 for the plaintiffs' expert disclosures?

18 MR. GILBERT: March 15th is when the experts have to
19 release their report.

20 THE COURT: Of 2024?

21 MR. GILBERT: Of 2024.

22 THE COURT: Yeah. Okay.

23 MR. RYBNICEK: Your Honor, our argument is not just
24 about burden. It's also about the data will be incomplete and
25 tentative at best. Many schools will not have made a

1 significant portion of their financial aid determinations by
2 the end of December; for example, MIT doesn't make its
3 determinations until mid-January. So there are only so many
4 determinations that are made in December, and many of those
5 are subject to appeal and revision.

6 THE COURT: So let me go back to Mr. Gilbert on that.
7 And what you say makes sense to me just based on my own
8 increasingly old anecdotal experience from when I had to deal
9 with this stuff on my kids. You know, some people get their
10 packages put together fairly early in the process, some come
11 later on, and not everybody has everything put together by the
12 end of December.

13 So, Mr. Gilbert, what that means, and I guess it's
14 kind of inherent in the enterprise, if you will, given the due
15 date for the experts' reports, that you're likely to face a
16 situation where you're not going to have full data for that
17 particular school year when you get that production in January
18 or February of 2024.

19 MR. GILBERT: Well, going back to your Honor's point
20 about negotiating about the shape of the table. Weeks ago, we
21 asked to substantiate that point and give us just a one-page
22 chart which universities of the 17 cannot -- do not make those
23 determinations until January, okay? We expressly asked for
24 that in a meet and confer. We were expressly told, "We'll
25 take it under advisement." We pretty much responded, "You

1 have to be kidding." I mean, this is a one-page chart that an
2 associate or a paralegal could put together in half a day at
3 most. And they've still refused to produce that to
4 substantiate this point. So if they refuse to substantiate
5 this point --

6 THE COURT: Okay.

7 MR. GILBERT: -- that's exactly the argument.

8 THE COURT: Let's just kind of war game this out
9 here. Let's say I tell them to give you that chart by like
10 next Tuesday, and it substantiates at least for some
11 significant number of schools the point that they are making
12 now? So now we're back to my question. You're going to be
13 getting -- what would you do at that point, then, now that you
14 know that you're going to be getting at least for some schools
15 not fully 100 percent complete data for that particular school
16 year?

17 MR. GILBERT: I know that the experts' general
18 response is more data is better than less data.

19 THE COURT: More data --

20 MR. GILBERT: And we have to see exactly what this
21 chart shows, and we've been asking for it for weeks.

22 THE COURT: Okay. All right. Okay. So here's what
23 we're going to do on that. I'm going to put short time frames
24 on this. And I know that we're talking about a decision
25 that -- we're talking about production that isn't going to be

1 made for months. I'm hoping to kind of put issues to bed
2 here. This one we're not going to fully put in bed; we're
3 kind of starting to tuck it in, if you will.

4 So by next Tuesday, just to pull a date out of the
5 air, that's the -- what is that, the 28th? -- the 28th of
6 February, the defendants are to produce to Mr. Gilbert the
7 chart that he's talking about regarding the timing of
8 financial aid decisions for the -- not for the current school
9 year, but for what's anticipated for the 2023/24 admissions
10 cycle. And I'm probably using the wrong lingo, but you know
11 what I mean, okay?

12 My inclination is to require the defendants to
13 produce that data as long as the deadline isn't, you know, in
14 January, and as long as the deadline is in February, it needs
15 to be enough before the plaintiffs' expert disclosure date to
16 give them sufficient time to assess it, but I think you can
17 take the comments that I'm making and kind of where I'm
18 leading it and work something out, so that's what I'm going to
19 ask you to do.

20 I'm going to ask you to file a status report on that
21 then by the 6th of March, which is the following Monday, just
22 addressing this one issue which I'm calling the 2023/24
23 admission data issue, okay?

24 On the --

25 MR. RYBNICEK: A point of clarification, your Honor,

1 it's financial aid data.

2 THE COURT: That's what I meant.

3 MR. GILBERT: I'm sorry, your Honor --

4 THE COURT: It's both, right? It's both. It's both,
5 yeah, because financial aid kind of travels as a team with
6 admissions except for some people. Anyway, so that's that
7 one.

8 Going back to the TAR issue, you know, as you were
9 talking, I, quite honestly, contemplated for a couple of
10 nanoseconds saying "Let me see these cases that you're talking
11 about which talk about, you know, what's the right
12 percentage." I've been at this long enough to know that
13 there's a decent amount of pulling things out of the air
14 that's happening, and those things are likely to be, so I
15 don't think that's a -- that's kind of a waste of time.

16 So understanding that there are no perfect solutions
17 to problems, I'm going to go with the defendants' position on
18 the question of -- I want to make sure that I state the
19 question correctly -- on whether -- pardon me -- on the issue
20 of applying search terms before applying the TAR methods.

21 And on the other issue which is the target recall
22 rate, I'm going to make it 75 percent which is a little higher
23 than what the plaintiffs asked for and somewhat lower than
24 what the defendants asked for. I'm sorry. I got that
25 backwards. Somewhat lower than what the plaintiffs asked for

1 and a little bit higher than what the defendants asked for.

2 So there you go.

3 MR. RYBNICEK: Your Honor, there are two other
4 issues. And apologies if this wasn't clear. There are two
5 other issues related to post-complaint discovery, if I could
6 just quickly address those?

7 THE COURT: Okay. I don't know. Can you just
8 quickly address them?

9 MR. RYBNICEK: I will try to as quickly as possible.
10 The first we have already dealt with is financial aid, the
11 other two are related to financial aid documents, and the
12 third is related to admissions documents.

13 So plaintiffs have said that they want to see our
14 practices after our financial -- our financial aid practices
15 after the expiration of Section 568 and the dissolution of the
16 568 Group. Defendants have said that they're willing to
17 produce financial aid documents.

18 What we're proposing is providing updated versions of
19 our financial aid handbooks, guidelines, training materials
20 that show how we determine financial aid awards after the
21 expiration of the 568 Group that we can --

22 THE COURT: As opposed to what?

23 MR. RYBNICEK: As opposed to doing a broad collection
24 and search of all documents.

25 THE COURT: So is that the first issue, or is that

1 both of the issues?

2 MR. RYBNICEK: That is the first issue, your Honor.

3 THE COURT: Tell me what the second issue is.

4 MR. RYBNICEK: The second issue is that plaintiffs
5 have asked for admissions documents for the post-complaint
6 period. And the defendants that are asserting the 568
7 exemption are already producing, as you know, many years of
8 admissions documents, and those are the appropriate and
9 logical place for plaintiffs to start. And for similar
10 reasons as your earlier ruling, your Honor, we don't think
11 that post-complaint admissions documents are relevant or
12 necessary to produce here.

13 THE COURT: So I'm going to anticipate Mr. Gilbert's
14 argument or at least part of it and ask you to respond to it.
15 So my expectation is that Mr. Gilbert is going to say:

16 How can you -- how can we see what the effect of the
17 alleged conspiracy was or the 568 exemption unless we see how
18 and to what extent things changed after either people withdrew
19 from the group or the exemption expired?

20 And if you don't provide the data, and not just the
21 manuals, but the data for that after period, that then the
22 experts, and ultimately me or the jury, doesn't have anything
23 relevant to compare it to.

24 So how would you respond to that?

25 MR. RYBNICEK: We don't disagree with that, your

1 Honor. That is why we have offered to provide handbooks
2 related to the financial aid determinations. Remember, this
3 is an alleged financial aid conspiracy, and admissions
4 materials are only relevant because of the 568 exemption, and
5 we have -- and there's no other relevance to those materials.

6 MR. GILBERT: Your Honor, may I address that?

7 THE COURT: Hang on a second. Let me just -- I just
8 want to push back a little bit.

9 And, again, maybe I'm anticipating something
10 Mr. Gilbert would be saying, but, I mean, I guess as a -- you
11 know, as a professional skeptic, what I would probably say on
12 that is "It's all well and good what's in the manuals, but we
13 want to actually see how it actually works in the field."

14 So what about that?

15 I mean, I don't know how this stuff works in
16 practice, but, you know, if what you're telling me is that the
17 folks in the admissions office and the financial aid office
18 are a bunch of automatons that basically just apply the manual
19 and it gets spit out, then, okay, that's what you're telling
20 me, but I'm guessing that you wouldn't tell me that.

21 MR. RYBNICEK: No, your Honor, but we think that the
22 manuals and handbooks and trading guides by which they make
23 these determinations are the most relevant piece of evidence
24 or at least the evidence or materials that are most responsive
25 to the request here.

1 THE COURT: Okay. Mr. Gilbert?

2 MR. GILBERT: First let me clarify a couple of things
3 about the issues on the table and then address these -- the
4 documents that we're talking about in terms of admissions and
5 financial aid policies.

6 What both parties or all parties have been using --
7 we're using the phrase "structured data" -- it's quantitative
8 things about admissions and financial aid. And we understand
9 your Honor just ruled on what has to happen about that, about
10 a chart on next Tuesday, et cetera.

11 THE COURT: Yeah.

12 MR. GILBERT: Okay. The other thing is documents,
13 not data. Documents go to financial aid policies and
14 admissions policies. We have -- and practices, how they've
15 changed their practices or didn't change their practices. We
16 have given the defendants multiple times at least six reasons
17 why this is relevant, and we've cited cases. They have not
18 rebutted any of those cases.

19 THE COURT: Right.

20 MR. GILBERT: None. The reasons include, first,
21 causation which your Honor was getting at; in other words, if
22 they changed the policies and the price went down after they
23 dissolved the conspiracy, that would strongly be evidence of
24 the cartel was raising the price.

25 Another is whether these are revenue-maximizing

1 entities which would trigger the per se rule rather than the
2 rule of reason.

3 Another reason is it can be used to rebut
4 justifications that, "Well, it was never feasible due to
5 something other than have a cartel."

6 Another reason was admission, rather, impeachment.

7 Another is internal admissions that -- what they had
8 been doing in the past; an email that says, "Henceforth, we
9 will no longer be made aware as to transfer students" -- says
10 what they were doing as to transfer students when the cartel
11 existed.

12 And it could be used as evidence against other
13 defendants who did not change their policies after the
14 dissolution of the cartel.

15 So for all those reasons, we've identified case law.
16 They haven't rebutted a single one. It's obviously relevant
17 evidence, your Honor, in multiple ways, and it should be
18 produced as to the policies and practices of financial aid and
19 admissions.

20 THE COURT: Okay. Mr. Rybnicek?

21 MR. RYBNICEK: Your Honor, we don't dispute that
22 there are -- we understand why the plaintiffs want financial
23 aid material, data and documents for the pre- and post-568
24 period: Obviously, to compare what had happened before and
25 after. And that is why we have readily offered to produce the

1 data and as well as the policies and practices.

2 The admissions materials is only relevant for the 568
3 exemption, and that is a binary --

4 THE COURT: See, that's the part I'm not getting.
5 I'm not understanding why that's the case. I mean, I -- and
6 maybe I'm just naive, but it just seems to me that the two, I
7 think I said before, travel as a team. Maybe that's a bit of
8 an overstatement, but there's linkage between the two as it
9 relates to the claims that are made in this case.

10 MR. GILBERT: Your Honor, if I may --

11 THE COURT: No, I'm with Mr. Rybnicek right now.
12 That's what I'm not understanding in your response.
13 I don't understand how you can de-link them.

14 MR. RYBNICEK: Well, the financial -- again, the
15 plaintiffs are alleging a financial aid conspiracy and whether
16 or not an alleged collusion changed the amount of financial
17 aid that is provided to students. Admissions materials -- and
18 in particular what they're seeking is materials that suggest
19 that the defendants are not need-blind so that they cannot
20 assert a 568 exemption. Admissions materials --

21 THE COURT: And so what you're telling me -- what
22 you're telling me is that once the exemption has expired or
23 it's no longer being asserted, the question of whether
24 admissions are need-blind doesn't matter anymore. That's what
25 I just got from what you said.

1 Did I get it right?

2 MR. RYBNICEK: Yes. Yes, your Honor. As well as
3 there are already many, many years of admissions documents
4 that we are producing during the period we're asserting the
5 exemption, the defendants that are asserting the exemption,
6 and adding additional documents.

7 THE COURT: Mr. Gilbert?

8 MR. GILBERT: Your Honor, may I respond?

9 THE COURT: It's got to be short, but, yes, go ahead.

10 MR. GILBERT: We believe your Honor has ruled on this
11 multiple times, okay, that the admissions goes to issues
12 beyond just the exemption, okay? We've talked about that the
13 last time your Honor ruled on it, okay, and you ruled on it
14 last August 15th; that is, it goes to statute of limitations
15 issues, okay, whether or not they were -- what they were doing
16 they were concealing, okay? We have to have -- be able to get
17 an opportunity to take discovery on that. It goes, as I
18 said --

19 THE COURT: Stop. All right. I've made up my mind
20 on this.

21 I think the plaintiffs have the better of this
22 argument. I think the admissions data is relevant, and I
23 don't think it's disproportionate, and I think that the --
24 just producing the manuals, as was suggested, isn't --
25 doesn't -- it falls short of providing relevant and reasonably

1 proportional materials. So that's the ruling on that.

2 So here's what I need you to do. The thing I talked
3 about as the first issue, the reason we were even talking
4 about it is I basically botched the language in the order when
5 I said that the custodial documents from the president and
6 development office is that the objecting defendants don't have
7 to apply, and I meant everybody, so I botched it. So I'm not
8 going to do that again.

9 Here's what I need you to do. I need a draft order
10 from you all by Monday which embodies the rulings that I made
11 here today. Don't try to change anything. I don't have to
12 have a whole bunch of findings in there. It's just the bottom
13 lines: This is what happens, this is when it happens, this is
14 who does it, this is how much you got to do. Get me that.
15 Hopefully, you'll be able to agree on the language. Send a
16 Word version to my proposed order email address.

17 MR. GILBERT: Thank you, your Honor.

18 THE COURT: Okay. All right. I'm going to gird my
19 loins before I ask this next question: Is there anything
20 anybody else wants to talk about?

21 MR. GILBERT: We want to talk about when we're
22 finally going to get a donation record. We haven't received
23 one yet.

24 THE COURT: I had to ask the question. I had to ask
25 the question. You know, the *New York Times* says that if you

1 ask a question in a video or a phone meeting and nobody
2 answers for 7 seconds, that means nobody's going to. You got
3 in at 6.8.

4 MR. GILBERT: All right.

5 THE COURT: All right. That's an issue for another
6 -- for the next time.

7 So, look, again, folks, I mean, I don't expect that
8 you're going to be able to, you know, look at the rulings that
9 I've made on these discovery issues and come up with a
10 pattern. And I acknowledge that this is a big and complicated
11 case, and there's a lot of parties on both sides, and there's
12 going to be problems. And I completely get that you've --
13 there's all of this stuff that you've worked out that's
14 completely under the -- you know, off of my radar screen, but
15 I hope -- the goal is as we go on, the number of -- the curve
16 on the issues that I have to decide is going south rather than
17 north, so just do your best to work out what else you've got.

18 I think we've got another status hearing down the
19 road, so I'm just going to table everything else until then
20 unless there's something that comes up that I have to decide
21 before then.

22 Everybody, take care. Thanks.

23 MR. GILBERT: Thank you, your Honor.

24 MR. RYBNICEK: Thank you, your Honor.

25 (Which were all the proceedings had in the above-entitled
cause on the day and date aforesaid.)

1 I certify that the foregoing is a correct transcript from
2 the record of proceedings in the above-entitled matter.

3 Carolyn R. Cox Date
4 Official Court Reporter
5 Northern District of Illinois
6 /s/Carolyn R. Cox, CSR, RPR, CRR, FCRR
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